Dr Michael Atun Wee v Malaysia Credit Finance Bhd & Ors

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NO 02-228 OF 1992
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
23 SEPTEMBER 1994

Land Law *— Transfer — Transferee to develop and sub-divide land and retransfer one lot back to transferor — Prohibitory orders entered on property by transferee's judgment creditors — Subsequent sale by public auction — Whether sale could be revoked — Whether transferor beneficial owner — Whether constructive trust*

Trusts and Trustees *— Transfer of property — Transferee to develop and sub-divide land and retransfer one lot back to transferor — Whether transferor beneficial owner — Whether constructive trust*

Contract *— Sale and purchase of land — Vendor becomes trustee for purchaser only if specific performance of agreement can be ordered by court*

The plaintiff and five others were the registered co-owners of one part of a piece of land ('the property'). By a written agreement dated 1 September 1980, they agreed with a developer ('Dunstan'), for the latter to develop and sub-divide the property and then to retransfer one of the lots back to the co-owners after the sub-divided title had been issued. In consideration of the terms and conditions of the agreement, the co-owners executed a memorandum of transfer of the property in favour of Dunstan, which was duly registered. On 19 August 1985, Bank Bumiputra Malaysia Bhd, the second respondent, obtained judgment in default of appearance against Dunstan on a loan guaranteed by Dunstan. On 19 May and 3 November 1986, both the first and second respondents registered prohibitory orders on the issue document of title to the property. On 28 February 1989, the court granted the second respondent an order to sell the property by public auction, where the third, fourth and fifth respondents were the successful bidders.

The plaintiff applied for a declaration that he was at all material times the true legal and beneficial owner of the property; that the prohibitory orders be set aside; that the order for sale of the property and the subsequent order of confirmation of sale be revoked; and for costs. The question for the court to decide was whether the 'bare trust' rule applied in this case, as the appellant's claim of being the beneficial owner of the property under the agreement was made on the basis of a constructive trust.

Held, dismissing the appeal:

(1) The effect of a bare trust alters the relationship of the parties from that of vendor/purchaser to that of trustee/beneficiary. In

A the present case, the agreement was, however, not a contract for the sale of land and, therefore, no vendor/purchaser relationship existed. It was an agreement made between the co-owners of the property and an individual developer for the latter to develop the property. The relationship that existed was purely contractual and did not create any trust relationship between them in respect B of the property. Moreover, the appellant had not shown by cogent evidence the existence of a constructive trust.

(2) The rule that the moment there is a valid contract for sale, the vendor becomes in equity a trustee for the purchaser, is not absolute because it is only applicable if specific performance of C the agreement between the vendor and purchaser can be ordered by the court. Otherwise, the trusteeship does not arise. Here, the plaintiff was one of the six co-owners of the property who entered into the agreement with Dunstan. Therefore, the proper parties to an action for specific performance would be the six co-owners and Dunstan. The court would not order specific performance at D the instance of the appellant since there was no evidence that the other co-owners had renounced their shares or assigned their rights in the property to the appellant.

(3) The order of confirmation of sale bound the appellant although he was never made a party to the proceedings, as the appellant E did not apply to set aside the order for sale of the property within one month from the date of the sale. The appellant should have intervened in the proceedings and filed an application to set aside the prohibitory orders or applied for a stay of execution.

F **[Bahasa Malaysia summary**

Plaintif dan lima orang yang lain merupakan pemunya bersesama yang berdaftar bagi sebahagian daripada sebidang tanah ('hartanah itu'). Melalui suatu perjanjian bertulis bertarikh 1 September 1980, mereka telah mengikat suatu perjanjian dengan seorang pemaju G ('Dunstan'), supaya Dunstan memaju dan memecah bahagikan hartanah itu dan kemudiannya memindahmilik semula satu daripada lot itu kepada pemunya bersesama itu selepas hakmilik yang telah dipecah bahagikan itu dikeluarkan. Sebagai balasan untuk terma dan syarat perjanjian itu, pemunya bersesama itu telah menyempurnakan suatu memorandum pindahmilik hartanah itu memihak kepada H Dunstan, yang telah didaftarkan. Pada 19 Ogos 1985, Bank Bumiputra Malaysia Bhd, responden kedua, telah memperolehi suatu penghakiman ingkar kehadiran terhadap Dunstan atas suatu pinjaman yang telah digerenti oleh Dunstan. Pada 19 Mei dan 3 November 1986, kedua-dua responden pertama dan kedua telah mendaftarkan I perintah larangan atas dokumen isu hakmilik hartanah itu. Pada 28 Februari 1989, mahkamah telah memberi suatu perintah kepada responden kedua untuk menjual hartanah itu melalui lelong awam, di mana responden ketiga, keempat dan kelima merupakan pembuat tawaran yang berjaya.

Plaintif telah memohon untuk suatu deklarasi bahawa pada masa yang penting, beliau merupakan pemunya di sisi undang-undang dan pemunya benefisial hartanah itu; bahawa perintah larangan itu diketepikan; bahawa perintah jualan hartanah itu dan perintah selanjutnya untuk mengesahkan jualan itu dibatalkan; dan untuk kos. Soalan yang perlu diputuskan oleh mahkamah adalah sama ada rukun 'bare trust' terpakai di dalam kes ini, kerana dakwaan perayu bahawa beliau merupakan seorang pemunya benefisial hartanah itu di bawah perjanjian itu dibuat atas asas amanah konstruktif.

Diputuskan, menolak rayuan itu:

(1) Sesuatu bare trust menukar perhubungan pihak daripada penjual/pembeli kepada pemegang amanah/benefisiari. Akan tetapi, di dalam kes ini, perjanjian itu tidak merupakan suatu kontrak untuk penjualan tanah itu dan, oleh itu, perhubungan penjual/pembeli tidak wujud. Ianya merupakan suatu perjanjian yang dibuat di antara pemunya bersesama hartanah itu dan seorang pemaju individu supaya pemaju itu memajukan hartanah itu. Perhubungan yang wujud itu merupakan suatu perhubungan kontrak semata-mata dan tidak mewujudkan sebarang perhubungan amanah di antara mereka berkaitan dengan hartanah itu. Lebih-lebih lagi, perayu tidak menunjukkan melalui sebarang keterangan yang meyakinkan bahawa amanah konstruktif itu wujud.

(2) Rukun bahawa apabila sahaja terdapat suatu kontrak jualan yang sah, penjual menjadi seorang pemegang amanah secara equiti untuk pembeli itu, tidak merupakan rukun yang mutlak kerana ianya hanya terpakai jika pelaksanaan spesifik perjanjian di antara penjual dan pembeli boleh diperintahkan oleh mahkamah. Jika tidak, peramanahan tidak akan wujud. Di dalam kes ini, plaintif merupakan seorang daripada enam pemunya bersesama hartanah itu yang telah mengikat perjanjian dengan Dunstan. Oleh itu, keenam-enam pemunya bersesama hartanah itu dan Dunstan merupakan pihak yang sewajarnya di dalam tindakan untuk pelaksanaan spesifik. Mahkamah ini tidak akan memerintahkan pelaksanaan spesifik atas permintaan perayu kerana tidak terdapat keterangan yang menunjukkan bahawa pemunya bersesama yang lain telah melepaskan segala tuntutan mereka terhadap bahagian mereka atau telah menyerahhakkan kepentingan mereka di dalam hartanah itu kepada perayu itu.

(3) Perintah mengesahkan jualan itu mengikat perayu walaupun beliau tidak pernah menjadi pihak kepada prosiding itu, kerana perayu tidak memohon untuk mengetepikan perintah jualan hartanah itu dalam jangkamasa sebulan dari tarikh jualan itu. Perayu itu sepatutnya mencelah di dalam prosiding itu dan memfailkan suatu permohonan untuk mengetepikan perintah larangan atau memohon untuk suatu penggantungan pelaksanaan.]

Cases referred to

Chang v Registrar of Titles (1976) 137 CLR 177; 8 ALR 285 (refd)
Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480 (refd)
Haji Yahaya bin Haji Ahman & Anor v WE Perera & Anor [1977] 1 MLJ 32 (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)
Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd [1991] 1 MLJ 98 (refd)
Lysaght v Edwards (1876) 2 Ch D 499 (refd)
Meriam bte Yaacob & Ors v Shell Malaysia Trading Sdn Bhd [1984] 2 MLJ 31 (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (refd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 (refd)
Warmington v Miller [1973] QB 877; [1973] 2 All ER 372 (refd)

Legislation referred to

National Land Code 1965 s 337
Rules of the High Court 1980 O 44 r 3(1), O 47 r 7(e), (f), (g)

Appeal from: Originating Summons No K30 of 1990 (High Court, Kota Kinabalu)

Norbert Yapp (*Jayasuriya Kah & Co*) for the appellant.
Bernard Lo (*Fernandez & Co*) for the first respondent.
Philip Lee (*Lee & Aziz*) for the second respondent.
JT Kulai (*JT Kulai & Co*) for the third, fourth and fifth respondents.

Mohamed Dzaiddin SCJ (delivering the grounds of decision of the court): This appeal arose from the decision of the High Court, Kota Kinabalu given on 27 March 1992, dismissing the plaintiff's application seeking the following reliefs:

(1) a declaration that he was at all material times the true legal and beneficial owner of a piece of property held under Keningau Country Lease No 135320240 ('the said property');

(2) that the prohibitory orders dated 19 May and 3 November 1986, respectively, registered on the register document of title to the said property be set aside;

(3) that the order for sale of the said property and the subsequent order of confirmation of sale be revoked; and

(4) costs.

After hearing counsel, we dismissed the appeal with costs and indicated that we would give our reasons in due course, which we do so now.

The plaintiff and five others were the registered co-owners of one part of a piece of land held under Keningau Native Title No 133031544

('the said land'). By a written agreement dated 1 September 1980, they agreed with one Dunstan Dumpangol, deceased, for the latter to develop their part of the said land for commercial purposes. It was a term of the said agreement that Dunstan, at his own cost and expense, would apply to the relevant authority for sub-division of the land and for conversion of land use to commercial purpose to be held under the country lease. Clause 11 stipulated that Dunstan shall also transfer the 'hotel lot' as indicated in the lay-out plan free from encumbrances to the co-owners as soon as the sub-divided title was issued by the relevant authority. In the meantime, in consideration of the terms and conditions of the said agreement, the co-owners executed a memorandum of transfer of their part of the said land in favour of Dunstan and on 3 September 1980, Dunstan presented the documents for registration at the Land Registry, Kota Kinabalu.

On 19 August 1985, Bank Bumiputra Malaysia Bhd ('the Bank'), the second respondent, obtained judgment in default of appearance against Dunstan in Civil Suit No K784 of 1985 on a claim by the Bank for the sum of RM4,614,663.58 and a further sum of RM1,303,085.17 with interest and costs given to the principal borrower and guaranteed by Dunstan. On 19 May and 3 November 1986, both the first and second respondents registered prohibitory orders on the issue document of title to the said property for which Dunstan was the registered proprietor. Consequently, on 28 February 1989, the court granted to the second respondent an order to sell the said property by public auction which was held on 20 May 1989, where the third, fourth and fifth respondents were the successful bidders. Finally, on 15 August 1989, an order of confirmation of the sale of the said property to the third, fourth and fifth respondents was confirmed and the memorandum of transfer for the conveyance of transfer of the said property to the purchasers was executed by the Deputy Registrar of the High Court, Kota Kinabalu, on behalf of the estate of Dunstan on 12 November 1990.

It was the plaintiff's case that he was at all material times the beneficial owner of the said property and the two prohibitory orders had been wrongly registered on the issue document of title to the said property, resulting in the auction sale of the said property at the instance of the Bank being null and void. In asserting his claim as the beneficial owner of the said property, the plaintiff relied mainly on cl 11 of the said agreement. He also relied on the undated memorandum of transfer (MAW–1) purportedly executed by Dunstan, as transferor, in favour of the plaintiff and one Ali Hassan bin Omar; a letter dated 5 June 1984 (MAW–S) from the solicitors confirming that they had prepared the transfer documents of the said property for the execution of the co-owners and suggesting that RM10,000 be inserted in the forms as the consideration; and, lastly, a letter dated 24 September 1984 (MAW–2) signed by Ali Hassan bin Omar relinquishing his right of ownership and title of the said property to the plaintiff. It was submitted on his behalf that notwithstanding the transfer of the legal ownership of the said land to Dunstan after the execution of the said agreement, it was the manifest intention of the contracting parties under cl 11 that Dunstan was to hold the said land as a trustee for the co-owners

pending the retransfer of the 'hotel lot' to the co-owners upon the issue of sub-divided title to the said 'hotel lot', and the documents referred to above would show that by the time the first and second respondents lodged the respective prohibitory orders, the plaintiff had acquired the entire beneficial interest in the said property. Thus, since at the date of the registration of the prohibitory orders, Dunstan only retained a bare title to the said property, the first and second respondents as his judgment creditors could not seize and sell more than what Dunstan, the judgment debtor, was entitled to sell. The authorities cited in support of the above proposition are *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 and *Chua Hee Hung v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480.

Unfortunately, the above submission did not find favour with the learned trial judge. In dismissing the application, his Lordship stated as follows (at p 19 of the appeal record):

> What exactly do we have here? An attempt by the applicant/plaintiff (the transferor) to regain a piece of land after he had knowingly transferred it to Dunstan Dumpangol (the transferee) and such transfer had, with the plaintiff's knowledge, led to the bank lending money to the transferee's company and which payment the transferee had guaranteed. Till today the loan remains unpaid. Was the transferor (applicant/plaintiff) an equitable owner? Did he come with clean hands and a pure heart? The judgment in *United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169 seems to support the third defendant's claims and that being so, the third defendant can pass the title to the fourth, fifth and sixth defendants on the sale. At the date the prohibitory orders were registered, Dunstan Dumpangol had the legal and equitable interests in the land. Nowhere was the plaintiff featured in the transaction or loan between Dunstan Dumpangol and the third defendant. How then could the third defendant know of the interest or existence of the plaintiff when it provided the loan?
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> While it is trite law that a judgment creditor can only seize and sell what the debtor can lawfully sell (see *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116) here at the time the judgment creditor seized the land, the judgment debtor (Dunstan Dumpangol) was lawfully possessed of the whole piece of the land and so the land was adequately seized under the prohibitory order and then lawfully auctioned. Lee Hun Hoe CJ (Borneo) in *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480 at p 484 said: 'In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah ...'. Mr Norbert Yapp, of counsel for the plaintiff, in his submission in reply to the fourth, fifth and sixth defendants claimed that the 'Torrens System of indefeasibility does not apply to lands in Sabah'. Although there is no vendor/trustee relationship here Mr Yapp's assertion cannot be right as such a statement goes against the roots of what the Chief Justice of Borneo has ruled above.

After discussing *Karuppiah* and *Chua Hee Hung & Ors*, the learned judge concluded:

> But in our instant case, the plaintiff had divested himself of his rights openly (by the transfer duly executed and registered) and then merely by way of an

> agreement, which was a private arrangement between two parties, he held back the land, to claim when he felt inclined to do so not caring whether by his earlier transfer, others are prejudiced or may lose their money or they be put to deep problems.

The appeal before us was basically against the above finding of the learned judge. However, the question which we have to decide is whether the 'bare trust' rule applies to this case. Under the general law principles, 'the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser' (*Lysaght v Edwards* (1876) 2 Ch D 499, Jessel MR at p 506). In *Chang v Registrar of Titles Chang v Registrar of Titles* (1976) 137 CLR 177; 8 ALR 285, Jacobs J said that the bare trust should mean 'no more ... than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner'. And Judith Sihombing in her book *National Land Code — A Commentary* (2nd Ed, 1992) at p 843 said that the effect of the bare trust was to alter the relationship of the parties from that of vendor/purchaser to that of trustee/beneficiary even though the nature of the transaction was that of sale.

There is a wealth of local authorities on the issue of bare trust on the sale of land. In *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224, Gill FJ said at p 229 that:

> ... the point at which the vendor becomes constructively a trustee for the purchaser is reached only when he has done all that is necessary to divest himself of the legal estate by executing a valid transfer of the land in favour of the purchaser.

In *Karuppiah*, the registered proprietor deposited his title with a lender as security for a loan. He then sold land to a purchaser, who had paid the purchase price in full and lodged a private caveat to protect his interest. When the vendor's judgment creditor tried to attach the land, the Federal Court held that the registered proprietor held as bare trustee for the purchaser who had paid the purchase price in full.

In *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, the proprietor sold land to a purchaser whom he gave a transfer in registrable form and the issue document of title. The government obtained a registrar's caveat preventing the registration of the transfer. The Federal Court held that as the proprietor had held as bare trustee for the purchaser at the time of the entry of the registrar's caveat, there was no interest of the proprietor capable of being affected by the caveat to protect the interest of the government as against the proprietor. Ong HS FJ stated at p 47: 'The law is clear that the vendors, after receipt of the full purchase price and surrender of possession of the lands to the [purchaser] are bare trustees ...'.

In *Chua Hee Hung* [1990] 1 MLJ 480, the appellants claimed to have bought the flats from Chu Yun and have paid the purchase price in full and subsequently, went into occupation. The respondent obtained a prohibitory order against the said property. The appellants then applied for the prohibitory order to be set aside on the ground that Chu Yun had no saleable interest in the property. The Supreme Court held, following

A *Karuppiah* [1971] 2 MLJ 116 and *Temenggong Securities*, that although Chu Yun, the judgment debtor, was the registered owner of the property, he was holding it as bare trustee for the appellants.

It should be observed from the above authorities that the 'bare trust' principle applies to contracts of sale of land so that 'the effect of a bare B trust is to alter the relationship of the parties from that of vendor/purchaser to that of trustee/beneficiary (Judith Sihombing, ibid). In the present case, the said agreement is, however, not a contract for the sale of land and therefore no vendor/purchaser relationship exists. It is an agreement made between the co-owners of the land and an individual developer for the latter to develop the said land for commercial purposes. In consideration C of the terms and conditions of the agreement, the co-owners transferred the land to the developer. One of the conditions was that the developer would transfer one of the lots in the said land back to the co-owners after the sub-divided title had been issued. Clearly, by cl 11 of the said agreement, the relationship that existed between the parties must be merely contractual D and did not create any trust relationship between them in respect of the said property. The remedy open to the co-owners would be to sue the developer for breach of cl 11.

What is also plain to us is that the appellant's claim of being the beneficial owner of the said property under the said agreement is made on E the basis of a constructive trust. It is trite that the onus lies on the appellant to prove that Dunstan held the said property as his trustee (*Meriam bte Yaacob & Ors v Shell Malaysia Trading Sdn Bhd* [1984] 2 MLJ 31). In this regard, counsel relied only on cl 11 of the said agreement where he submitted that it was clear from this clause that it was the manifest intention of the parties that Dunstan was to hold the land as bare trustee F for the co-owners pending the retransfer of the 'hotel lot'. However, as we have stated above, this clause did not create a trust relationship between the co-owners and Dunstan. We were satisfied that the appellant had not shown by cogent evidence the existence of a constructive trust. In the circumstances, the appellant's contention that Dunstan was his constructive G trustee of the said property remained a bare assertion.

It is also significant to remember that the rule that 'the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser' is not absolute because it is only applicable if specific performance of the agreement between the vendor and purchaser can be ordered by the H court. Otherwise, the trusteeship does not arise (*Warmington v Miller* [1973] QB 877; [1973] 2 All ER 372). The position in Sabah was stated by Lee Hun Hoe CJ in *Chua Hee Hung* [1990] 1 MLJ 480 at p 484, after referring to *Chang v Registrar of Titles Chang v Registrar of Titles* (1976) 137 CLR 177; 8 ALR 285:

I > In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens System, the vendor/trustee relationship applicable in Peninsular Malaysia should be equally applicable in Sabah if specific performance is ordered by the High Court except so far as they are precluded from doing so by statutes ...

In the present case, the question here is whether under the terms of the said agreement, specific performance would be ordered by the court at the instance of the appellant against the estate of Dunstan, deceased. The plaintiff was one of the six co-owners of the land who entered into the said agreement with Dunstan. Under cl 11, Dunstan agreed to transfer the 'hotel lot' back to the first party which comprised the six co-owners as soon as the sub-divided title of the said property was issued by the authority. Therefore, the proper parties to an action for specific performance would be the six co-owners and Dunstan. It would seem that if specific performance were to be decreed against the estate of Dunstan, deceased, under cl 11 or any other clauses therein, then, based on the facts, the court would not order specific performance at the instance of the appellant since there was no evidence that the other co-owners had renounced their shares or assigned their rights in the property to the appellant.

For the above reasons, we were satisfied that both on the facts and law, the 'bare trust' principle did not apply to the present case. Therefore, as Dunstan had retained legal ownership of the said property at the time of the registration of the prohibitory orders by the first and second respondents, the subsequent order of sale by public auction granted by the High Court, Kota Kinabalu on 28 February 1989 was valid and proper.

As regards the claim of the third, fourth and fifth respondents that they have acquired the title to the said property, which the confirmation of sale by the High Court had made their ownership absolute, the response of the appellant was as follows. First, it was submitted that the said auction sale of the said property to these respondents did not take away the rights of the appellant as the beneficial owner of the said property. This was because when the court ordered the sale of the judgment debtor's property, it could not sell more than what Dunstan the judgment debtor was entitled to sell. Counsel relied on *Karuppiah* and *Chua Hee Hung*. In our judgment, this argument no longer holds water in view of the reasons which we have given above.

Secondly, it was contended that the order of confirmation of sale dated 15 August 1985 did not bind the appellant because he was never made a party to the proceedings. Neither the order for sale nor the said order of confirmation was served on the appellant under O 44 r 3(1) of the Rules of the High Court 1980 ('the RHC'). Counsel further submitted that it was never too late for the appellant to challenge the validity of the auction sale, relying on *Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd* [1991] 1 MLJ 98. This case is, however, an authority for the proposition that as the provision of O 47 r 7(g) of the RHC and s 337 of the National Land Code 1965 in relation to an auction sale had not been followed, the issue whether the auction sale of the land by the court was absolute was held to be contentious.

The facts of the matter were that the third, fourth and fifth respondents purchased the said property at an auction sale on 20 May 1989 at the Magistrate's Court Keningau. The auction sale of the said property was confirmed by the High Court Kota Kinabalu on 15 August 1989. Under

A O 47 r 7(g)(i), such confirmation of sale becomes absolute unless an application was made under paras (e) or (f) or where such application was made and disallowed by the court. It is further provided that no such order confirming the sale shall be made until after the expiration of one month from the date of the sale. Also, under O 47 r 7(e), any person whose interests are affected by the sale may apply to set aside the sale on the B ground of a material irregularity or fraud in publishing or conducting the sale. In *Haji Yahaya bin Haji Ahman & Anor v WE Perera & Anor* [1977] 1 MLJ 32, the High Court allowed an application to set aside an auction sale of a piece of property holding that there was material irregularity in the sale in that the order for sale was improperly issued as the judgment C debtor had no more interest in the land at the date of the order of sale. In the present case, the record showed that the appellant did not apply to set aside the order for sale of the said property within one month from the date of the sale. In fact, a letter dated 6 October 1987 (HCH–1) to the appellant's solicitors should serve sufficient notice to them of the existence of the prohibitory orders on the issue document of title to the said property. D The logical thing to do would be for the appellant to intervene in the proceedings and file an application to set aside the prohibitory orders or apply for a stay of execution pending the decision in *Chua Hee Hung* [1990] 1 MLJ 480. The record also showed that the appellant or his solicitors never made any attempt to find out from the solicitors of the E second respondent regarding the sale of the said property by public auction. Public notice of the proclamation of sale of the said property was advertised in Sabah's *Daily Express* on 6 and 19 May 1989, respectively.

From the facts and circumstances which we have highlighted above, we were satisfied that the auction sale and the subsequent order of F confirmation of the sale were valid.

For reasons we have stated, we dismissed this appeal with costs. Deposit to account for taxed costs.

Appeal dismissed.

G Reported by Prof Ahmad Ibrahim

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